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No. 01-526

In The

Supreme Court of the United States

SUZANNE C. COSTO, AS PERSONAL REPRESENTATIVE FOR NOLLIE P. COSTO; PEDRO COSTO, HUSBAND; ROSA COSTO, WIFE; JEFFREY GRAHAM, AS PERSONAL REPRESENTATIVE FOR CHRISTIOPHER J. GRAHAM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The Federal Tort Claims Act precludes suing the Government for claims "arising out of the combatant activities of the military . . . during time of war." 28 U.S.C. § 2680(j). The Court derived its "incident to service" test from this language over fifty years ago in *Feres v. United States*, 340 U.S. 135, 146 (1950). Respondent does not dispute that this Court has not elucidated this test in any holding since 1954. Pet. 9.

1. Respondent errs in asserting (without illustration) that the circuits' disparate applications of *Feres* (Pet. 16-20) represent no more than distinctions without a difference. *See* Br. in Opp. 6. Some courts have just despaired of any principled analysis of the doctrine. One has seen this Court as so far abandoning both statute and precedent that *Feres*

> encompass[es], at a minimum, *all* injuries suffered by military personnel . . . even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and . . . military activity. . . .

Major v. United States, 835 F.2d 641, 644-45 (6th Cir. 1987). And one need look no further than courts' opposite results on identical facts to see the mischief wrought in the long absence of guidance from this Court. *See* Pet. 25, 28.

2. Respondent would have it that the factual differences between this case, *Taber* and *Whitley* justify the unwarranted conclusion that these decisions are not disharmonious. Br. in Opp. 7-8. This *non sequitur* does not alter the fact that those cases' rationales, if applied to the facts below, would allow petitioners' claims to proceed.

That's a conflict. If it took identical fact patterns to demonstrate a conflict between circuits, grants of certiorari on this basis would be rare indeed.

3. Respondent twice advances the dubious proposition that the decedents' holiday outing was "incident to service" because "[t]hey were subject at all times to military discipline and regulations with respect to their conduct on the trip as well as their custody" of Navy rafting equipment. Br. in Opp. 2, 7-8. This argument proves too much, and would put "paid" to any meaningful limitation on the *Feres* doctrine. The only applicable "discipline and regulations" controlling the military rafters were those general sanctions available against all servicemen for any violation of the Uniform Code of Military Justice. *See* Pet. App. 33-34. Precedent teaches that the military has plenary court-martial jurisdiction over all of its active members. *Solorio v. United States*, 483 U.S. 435, 448 (1987). Respondent's proposal would therefore have the effect of rewriting the FTCA to allow " 'any claim but that of servicemen' ", a position this Court has rejected for over fifty years. *See Brooks v. United States*, 337 U.S. 49, 51 (1949).

4. The Government argues that *Brooks* cannot control the instant case because its salient feature was the "mere fortuity" that its plaintiffs were military members, while decedents here were killed because of their military status. Br. in Opp. 4-5. Respondent overlooks the sheer happenstance that it was Costo and Graham who died, rather than any civilian rafters (such as the 10-year-old boy on the trip) whose claims *Feres* would not have barred.

5. Respondent cites *United States v. Johnson* for the proposition that *stare decisis* militates against reexamining

Feres, saying that case "expressly reaffirmed" *Feres*. Br. in Opp. 8-9. Of course, the *Johnson* Court was not even asked to overrule *Feres*. *See Johnson*, 481 U.S. at 703 (Scalia, J., dissenting). Respondent also quotes this Court's observation that *stare decisis* takes on particular importance in cases of statutory interpretation. Br. in Opp. 8. But abundant language in the same decision makes plain that when "growth" of the law has "weakened the conceptual underpinnings" of precedent; or "inherent confusion" from an "unworkable decision" has wreaked "positive detriment to coherence and consistency in the law . . . "; or when " 'tested by experience, [a precedent] has been found to be inconsistent with the sense of justice or with the social welfare' "; overruling it may be not only proper, but necessary. *Patterson v. McLean Credit Union*, 491 U.S. at 172, 173, 174 (citations omitted). As it has been applied, *Feres* is precisely such a case.

6. Respondent asserts that its brief in opposition in *Sonnenburg v. United States* "responds fully" to petitioners' request that *Feres* be reexamined. Br. in Opp. 10. But that brief also overstates *Johnson*'s significance, again artfully omitting to mention that overruling *Feres* was not there at issue. And that brief's most ringing affirmation of the doctrine was that "incident to service" was a "relatively clear" test. This alleged clarity, however, was only in comparison to the worst-case scenario of "compelled depositions and trial testimony by military officers concerning the details of their military commands", a specter not remotely presented by this case. *Cf. United States v. Stanley*, 483 U.S. 669, 682-83 (1987) (emphasis added) *with* Pet. 14 & 14 n.6.

7. The six supporting cases respondent listed in *Sonnenburg* and lists again now (Br. in Opp. 7) are no more dispositive than they were eleven years ago. *Bon, Walls, Hass,* and *Woodside* all featured the sort of "strict and pervasive" regulation suggesting "direct and substantial" armed forces involvement that might render *post hoc* civilian judicial scrutiny particularly inappropriate. *See Bon,* 802 F.2d at 1095 n.3; *Walls,* 832 F.2d at 94 n.2; *Hass,* 518 F.2d at 1141 & 1141 n.2; and *Woodside,* 606 F.2d at 136-37 & 142. In *Millang,* especially, the allegation of negligence by an on-duty on-base military policeman was exactly "the type of claim that could well call military decisions into question." *See Millang,* 817 F.2d at 535 (citations omitted). Presence of no more particularized regulation in the case at bar than general UCMJ sanctions makes this case readily distinguishable. In addition, in *Walls,* Aero Club membership was open only to active duty military personnel – quite unlike the loose criteria for participation in this rafting trip by civilians and even aliens. *Cf. Walls, supra with* ER 60 & Supp. ER 54-58. Finally, the swimmer killed in an on-base pool in *Chambers* was "present and accounted for" and on active duty on the base that day, quite unlike the rafters here. *See Chambers,* 357 P.2d at 227-28.

8. Respondent's last and strongest argument is that uniform benefits are "indispensable", and non-uniform recovery would be fatal, to military morale. Br. in Opp. 11. But Justice Scalia's skewering of this "peculiar rule of solicitude" in *Johnson* is just as apt here. He observed that "the morale of [Johnson's] comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might

have recovered had he been piloting a commercial helicopter at the time of his death." *Johnson*, 481 U.S. at 695-96, 700 (Scalia, J., dissenting). Decedents' survivors should also not have to regret that their loved ones chose military careers.

9. Respondent also has no answer to the unprecedented and widespread chorus clamoring for *Feres*'s reversal or revision (Pet. nn.10-12), except to imply that the four *Johnson* dissenters, the many learned commentators, and the sixty-five or more federal judges who have called for its correction, are just plain wrong. This case involves facts that could scarcely less implicate the doctrine's core concerns. Petitioners respectfully request this Court to readdress the *Feres* doctrine and redefine it in a manner consistent with reason, justice, and a sound interpretation of the statute from which it purports to be derived.

Respectfully submitted,

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